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Taxation of the Business and Franchises of Corporations

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TAXATION OF THE

BUSINESS AND FRANCHISES OF CORPORATIONS.

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CHAPTER I.

Causes Leading to the Insertion of the Commercial Clause in the Constitution.

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When the American Colonies threw off the British yoke and became "free and independent states," the power to regulate intercourse with foreign nations and with each other vested in the Several States. They were not divested of this power by the adoption of the Articles of Confederation for this agreement simply formed a league of the Several States, whose ambassadors met in an assembly called the Continental Congress, to discuss and recommend measures for the common welfare. This body could make treaties but it could not enforce them and it was given no power enabling it to control commercial relations, whether internal or external.

The Articles of Confederation served the purposes of the United States as long as the American people were beset by a foe from without and must of necessity unite every effort in this struggle for independence; but when hostilities ceased the need of a stronger central authority became manifest. The common danger being absent the States no longer strove for the "common cause." Each sought its interests even to the prejudice of its neighbors.

A vexatious problem in each of the States was the raising of revenue. A comparatively easy solution--the taxation of all imports--was found by those States having good harbors; e. g., New York, Pennsylvania, and Rhode Island: but this bore heavily on the people of other States who had to make use of those harbors. The inhabitants of New Jersey situated between the harbors of New York City and Philadelphia were thus forced to unwillingly pay a large proportion of the revenues going to support the Pennsylvania and New York governments. Connetticut situated between New York City and Newport was similarly burdened. Goods passing from one State to another were also heavily taxed. In short each State sought as far as possible to make the citizens of other States pay its own governmental expenses. The burdens thereby imposed and the jealousies aroused threatened the disruption of the Confederation; but Congress was powerless to interfere. Other causes also tended to show the necessity of a stronger central power but none were as efficacious as the prevalent commercial distress.

Even before the adoption of the Articles of Confederation New Jersey declared herself in favor of giving Con-

gress exclusive control of commerce in the following language, viz,--"The sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in Congress" but the proposition did not meet with favor. Commercial distress soon became general and the leaders of the people began to realize that something must be done. In 1781 we find Alexander Hamilton trying through The Continentalist "to confirm an opinion already pretty generally received, that it is necessary to augment the power of the Confederation," adding that nothing short of the power to regulate trade would suffice. This thought runs through that whole series of papers, of which the last number is devoted to the "consequences of not authorizing the Federal Government to regulate the trade of these States."

On Feb. 3, 1781 Congress took up the matter and recommended the States to vest Congress with power to regulate commerce, levy duties, etc; but Rhode Island fearing to lose her prestige refused to comply. Congress further urged the necessity of increasing its control over commerce by resolutions adopted on each of the following dates, viz;--Apr. 30, 1784, July 13, 1785, Mar. 3, 1786, and Oct.23, 1786.

New York had adopted resolutions on July 21, 1782, pointing out the want of power in the Federal Government and recommending the "assembling a general convention of the States, specially authorized to revise and amend the Confederation" but nothing resulted. It remained for Virginia to take the initial step which led to the Annapolis Convention by a set of resolutions adopted Jan. 21, 1786, appointing commissioners to "meet such commissioners as may be appointed by other States---------- to examine the relative situations and trade of the said States; to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their present harmony." Following Virginia's lead several other States appointed commissioners who met at Annapolis in Sept. 1786, the convention having for its object, as was declared in its address to the States, "the trade and commerce of the United States." The delegates being diversely instructed and all the States not being represented the Annapolis Convention adjourned recommending another Convention at Philadelphia in May following. Mr. Justice Miller, speaking with reference to the origin of the Annapolis Convention which lead to the adoption of the Con-

stitution, once said;--"It is not a little remarkable that the suggestion which finally led to the relief without which as a nation we must soon have perished, strongly supports the philosophical maxim of modern times that of all the agencies of civilization and progress, commerce is the most efficient. What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers could not force the Several States to attempt , was brought about by a desire to be released from the evils of an unregulated and burdensome commercial intercourse."

When the Philidelphia Convention met it drew up the Constitution which was forthwith transmitted to the States for their ratification. Much bitter discussion followed but nothing caused greater objections to the proposed Constitution than the commercial clause, which reads as follows, viz;--"The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The advocates of the Constitution boldly championed this grant of power to Congress and some of the strongest papers in the Federalist are on the benefits to be derived from an un-

hampered commerce and the necessity of placing commercial intercourse under federal control. In No. 12 of the Federalist Hamilton says;--A prosperous commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful, as well as the most productive, source of national wealth; and has accordingly become a primary object of their political cares. By multiplying the means of gratification, by promoting the introduction and circulation of precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate all the channels of industry and to make them flow with greater activity and copiousness." In No. 22 the same writer says;--"The want of a power to regulate commerce, is by all parties allowed to be one of the defects of the existing federal system which concur in rendering the system altogether unfit for the administration of the affairs of the union----------
It is indeed evident on the most superficial view, that there is, no object either as it respects the interests of trade or finance, that more strongly demands a federal superintendance." In No's. 7 and 11 he writes in the same strain as does also Madison in No. 42. Although the Con-

stitution was adopted by the Convention in Sept. 1787, all of the States had not ratified it until May, 1790, Rhode Island being the last because of her bitter opposition to the commercial clause.

CHAPTER II.

The Limitation Put upon the Power of the States.

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Thus have I dwelt at considerable length upon one of the principal causes leading to the adoption of the constitution and the reason for the insertion therein of the commercial clause. Apparently this clause is clear--the power to regulate international and inter-state commerce being vested in Congress; but notwithstanding this apparently clear and distinct prohibition of interference by the States, their attempted usurpations of the Congressional perogative have been many. The States have been actuated by various purposes but usually by desires to benefit their own citizens to the disadvantage of the citizens of other States. Statutes of varying import have been enacted but even though so skillfully drawn that their disguises were well nigh impenetrable, the courts have generally succeeded in looking through them and in ferreting out attempted regulations of inter-state commerce. Frequently have States attempted to lighten the burdens on

their own citizens byraising revenue from taxes levied on interstate commerce. They have attempted to tax the commerce itself (State Freight Tax, 15 Wal. 232; Henderson v. The Mayor 92 U. S. 259; Crandall v. Nevada 6 Wall. 35; Telegraph Co. v. Texas 105 U. S. 460), the receipts from interstate commerce (Fargo v. Michigan 121 U. S. 230; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326; Western Union v. Alabama 132 U. S. 472, Ratterman v. Telegraph Co. 127 U. S. 411), and those engaged in carrying on interstate commerce (Picard v. Car Co., 117 U. S. 34; Robbins v. Taxing Dist., 120 U. S. 489; Le Loup v. Mobile, 127 U. S. 640; Asher v. Texas, 128 U. S. 129; Mc Call v. Calafornia 136 U. S. 104; Crutcher v. Kentucky, 141 U. S. 47) but they have failed in their attempts.

While statesmen are trying because of economical, as well as political, reasons to reduce the tax levies on tangible property they are forced to seek new methods of raising revenue with which to meet the ever increasing demands on the State treasuries. Together with the increasing tendency on the part of the State to tax intangibles, thereby increasing the liability to inadvertantly tax

interstate commerce, has come a greater disposition on the part of those to be taxed to apply to the courts for relief from taxes claiming the statutes to be unconstitutional attempts to regulate interstate commerce. By the numerous decisions handed down we come to know more of the meaning of the commercial clause but the law-makers also know more of its intricacies and so skillfully do they draw the statutes that laymen are easily deceived and many usurpations of Congressional power pass unnoticed. Mr. Justice Miller speaking of the commercial clause once said; "there are at this hour upon the statute books of almost every State laws violating that provision." (Miller on the Constitution p. 80.) Even after much litigation and many learned expositions of the law, extending from Gibbons v. Ogden, 9 Wheat. 1, to State of Maine v. Grand Trunk Ry. Co. 142 U. S. 217, there remains great uncertainty as to where the power of the State ceases and where that of Congress begins, as to what is and what is not a regulation of commerce. Let us now consider a few of the most important cases arising under this clause of the Constitution; cases which show the interpretation of this clause by our highest court, cases which point out the powers which were conferred upon Congress, and which indicate to what extent the sovereign powers of the States were limited.

We will first examine Gibbons v. Ogden, 9 Wheat. 1, which was decided in 1824. The opinion of the court was delivered by John Marshall whose lucid opinions have done so much to enlighten us as to the proper interpretation of the Constitution. The State of New York granted to Livingston and Fulton, for a term of years, the exclusive right to navigate all the waters within its jurisdiction with boats moved by steam or fire. A vessel propelled by steam but registered under an act of Congress regulating the licensing of vessels to engage in the coasting trade sought to navigate waters within New York, disregarding the exclusive rights granted by that State. In the course of litigation arising therefrom the validity of the New York statute was questioned. The United States Supreme Court said that the power of Congress to regulate commerce included the power to regulate navigation and that the power did not stop at the external boundary of a State. "This power like all others vested in Congress is complete in itself and may be exercised to its utmost extent, acknowledging no limitations other than are prescribed in the Constitution." The New York statute was held to be inoperative inasmuch as Congress had expressed its will by

passing the licensing statute but the court carefully refrained from discussing the question whether the New York statute would have been void if Congress had remained silent.

While Johnson, J., agreed with the court in its decision, he based his opinion on broader grounds thinking that the mere granting to Congress of this power to regulate commerce had ipso facto stripped the States of all authority over commerce. In the course of his opinion Chief Justice Marshall said without doubt the States might pass inspection laws, quarantine laws, and health laws which may have a remote and considerable influence on commerce but that such laws are a part of that mass of legislation not surrendered to the general government. "No direct general power over these objects is granted in Congress; and consequently, they remain subject to State legislation."

Three years later (in 1827) came Brown v. Maryland, reported in 12 Wheat. at p. 436, which case involved the validity of a Maryland statute requiring an importer to take out a license and pay a fee of fifty dollars before he should be permitted to sell imported goods. The court held this statute unconstitutional, being a prohibited regulation of commerce. The court said, "The distinction between a tax on the thing imported and

and on the person of the importer can have no influence. It is too obvious for controversy that they interfere equally with the power to regulate commerce". In his clear and well-written opinion Marshall, Ch. J., spoke as follows concerning a State's taxing powers:--"We admit this power (of a State to tax its own citizens) to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseperable from the nature of things and the Constitution has applied it to the often interfering powers of the general and State governments as a vital principle of perpetual operation. It results necessarily, from the principle that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of taxes

of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce."

The License Cases, 5 How. 504, decided that certain State statutes requiring licenses of liquor dealers were not regulations of commerce. The diversity of reasons governing the justices are interesting but the opinions are chiefly valuable in our present discussion because of the remarks of some of the justices concerning the extent of the power of Congress over commerce. Taney, Ch. J. said that the "mere grant of power to the general government cannot upon any just principles of construction be construed to be an absolute prohibition to the exercise of any power over the same subject by the States." Woodbury J., said; "There is nothing in its nature in several respects to render it more exclusive than other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the States. But I admit, so far as regards the uniformity of a regulation reaching to all the States it must in these cases, of course, be exclusive; - - - - - - - - - -. But there is much in connection with foreign commerce which is local within each State,

convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it."

The Passenger Cases, 7 How. 283, concerned the validity of State laws requiring the masters of vessels engaged in foreign commerce to pay a certain sum to a state officer on account of every passenger brought from a foreign country into the State. The statutes were held by a divided court (five to four) to be unconstitutional. Of the five justices voting that the laws were unconstitutional some thought that the power to regulate commerce was exclusively in Congress while others thought that the case did not require the court to pass on that question. Woodbury, J., said that he did not think that Congress by remaining inactive thereby virtually enacted that the States should do nothing concerning commerce.

This review of the case shows us that up to this time the court had settled upon no definite rule by which to measure the extent of the power over commerce vested in Congress or by which to determine when the States, endeavoring to exercise only their own legitimate powers, exceed their authority and invade the domain of Congress. As the

cases had arisen the court had dextrously avoided laying down any definite rule drawing the line between national and state authority. The single justices had expressed different views but it was not until Cooley v. The Board of Wardens, 12 How. 299, decided in 1851, that any definite rule was laid down by the court. This case arose concerning the validity of laws of Pennsylvania regulating pilots and pilotage. Curtis, J., delivered the opinion, from which I quote at considerable length. "The diversities of opinion therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power to regulate commerce. But when the nature of a power like this is spoken of, when itis said that the nature of the power requires that it should be exercised exclusively by Congress; it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive regulation by Congress. Now the power to regulate commece embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United

States in every part; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

"Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assent concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national or admit only of one uniform system, or plan of recognition, may justly be said to be of such a nature to require exclusive legislation by Congress. That this is cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act in Sept. 1879 contains a clear and authorative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be provided for not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities

of the ports within its limits."

The distinctions made in this decision have since been generally recognized and the case itself has become an authority. The case held in effect that the States may enact valid inspection laws, quarantine laws, pilotage laws etc., laws concerning matters of local importance, and admitting of local legislation, even though they incidentally affect interstate commerce, until Congress itself shall legislate upon the matter. This has often been approved. Henderson v. The Mayor, 92 U. S. 259; Sherlock v. Alling, 93 U. S. 99; Hall v. De Cuir 95 U. S. 485, 488; Munn v. Illinois, 94 U. S. 113, Wilson v. Blackbird Creek Marsh Co. 2 Pet. 250, Gilman v. Philidelphia 3 Wall. 713.

As to those commercial relations which by their nature demand one uniform system of regulation throughout the whole extent of the country it was for a long time uncertain whether the States could legislate when Congress had done nothing but it was settled in Welton Welton v. Missouri, 91 U. S. 275, that the silence of Congress is tantamount to a declaration that such commerce shall be unrestrained, so that whether Congress has acted or not the State cannot legislate concerning this class of inter-

state commerce. Brown v. Houston 114 U. S. 622; Walling v. Michigan 116 U. S. 446; Robbins v. Shelby Taxing District 120 U. S. 489; Railroad Co. v. Husen 95 U. S. 465;.

CHAPTER III.

Corporations Engaged in Commerce Wholly Within a State.

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Now that we have examined the Constitutional limitations of State authority over inter-state commerce, let us turn our attentions to corporations that we may see what they are and to what extent they are subject to State control. A corporation is a creature of the law which has perpetual succession and which is distinct from the persons composing it who as members have no authority to bind the corporation and who are not personally bound by the corporation's liabilities. In the Dartmouth College Case Marshall Ch. J., characterized a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." Inasmuch as they come into existence only by virtue of creating statutes, the scope of their authority is only such as these statutes give them and they are subject to such liabilities and limitations as the statutes impose. By accepting their charters they become subject to the imposed conditions but it was held in the Dartmouth College

Case (4 Wheat. 518) that a charter reserving to the State no power to make future changes was a contract between the State and the corporation, which the State could not thereafter change because of the Constitutional provision forbidding States to pass any law impairing the obligation of contracts. Some of our best legal thinkers are beginning to doubt the correctness of this decision but it is now the accepted law. Since this decision was rendered the States, when granting corporate existence, have for the most part reserved to themselves the right to alter corporation charters at will, so that now corporations are at the mercy of their creating States and their very existence hangs on the mere caprice of the State legislatures.

Many corporations extend their operations outside the States of their creation into other States of the Union, and when in States other than that of their creation they are called "foreign" corporations. The charters of corporations, like other State legislation, have no extra-territorial effect. Their operation is necessarily confined to the jurisdiction of the States granting them. Consequently we must examine the status of those corporations which, created by one State, desire to exercise their corporate franchise in other jurisdictions. In prosecuting this inquiry, however, let us for the present

carefully exclude from our investigation all corporations partially or wholly engaged in inter-state commerce.

It was decided in Bank of Augusta v. Earl, 13 Pet. 519 and Paul v. Virginia, 8 Wall. 168, both of which have often been followed and approved, that a corporation has no inherent right to exercise its corporate functions in any State other than that of its creation. It cannot migrate from one State to another at will, for, when it passes the boundaries of its own State, its right to be recognized in its corporate capacity ceases. Other States may absolutely refuse to admit it. It cannot claim admission under that clause of the Constitution guaranteeing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States" because a corporation is not a "citizen" within its meaning. As Field, J., said in Paul v. Virginia, "The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."

The States may refuse to admit foreign corporations altogether or they may recognize and receive them upon their

compliance with certain imposed conditions. The nature of the conditions is entirely within the discretion of the legislatures of the States and consequently we find in the State statutes, enacted regarding the admission of foreign corporations, many manifestations of the short-sightedness, cupidity, and and selfishness of mankind. It is not unusual for these statutes to discriminate against foreign corporations in favor of domestic corporations by imposing extortionate and oppressive conditions upon foreign corporations seeking admission but the foreign corporations are powerless to object. They must either remain without or submit to the burdens inflicted upon them. Bank of Augusta v. Earl, 13 Pet. 586; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; People v. Philadelphia Fire Ins. Co. 92 N. Y. 311, ditto 119 U. S. 110; Pembina Mining Co. v. Pennsylvania 12 U. S. 181; Home Ins. Co. v. New York 134 U. S. 594.

However there is one limitation upon the rapacious greed of the States. They cannot require as a condition precedent to admission that the foreign corporations agree to give up their constitutional right to remove litigation from the State courts to Federal courts. The courts will not

allow a corporation to contract away its constitutional privileges. Such an agreement is contrary to public policy. Consequently State statutes requiring such concessions have been held void and agreements made under them mere nullities. Home Insurance Co. v. Morse 20 Wall. 445; Barnon v. Burnside 121 U. S. 186.

While holding in mind that States may absolutely prohibit the entrance of foreign corporations or may permit their entrance upon prescribed conditions, we must not lose sight of the fact that foreign corporations may and frequently do enter States which have no statute concerning foreign corporations. This is by reason of comity among the States. "In harmony with the general law of comity obtaining among States composing the Union, the presumption should be indulged that the corporations of one State, not forbidden by the laws of its own being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy, to be deduced from the general course of legislation or from the settled adjudications of its highest courts." Christian Union v. Yount 101 U. S. 352.

The practical results of the holding that a corporation is not a"citizen" within the meaning of that clause of the Constitution securing the citizens of each State the privilege and immunities of citizens of the several States are not conductive to harmonious feeling between the States and to the best interests of the people at large. Influenced by the example of the national government endeavoring to advance the interests of its people by protective tariffs, it is only natural that the States attempt to foster their own corporations by discriminating against foreign corporations doing business within their borders. The domestic corporations themselves may thereby be benefited but it is questionable whether the interests of the people of the States are advanced by this lessening of competition. The politicians and pseudo-statesmen fail to recognize that the best interests of the State are served not by repelling but rather by attracting capital and business enterprises.

Another result of the unlimited power of the States over foreign corporations is that this class of corporations are severely taxed in some of the States. There is a growing tendency throughout the Union to increase the burdens im-

posed upon all corporations. Nothing at the present time more occupies the minds of State legislators than the problem of raising revenue for State purposes. Within the past few years many of the States have revised or modified to a considerable extent their tax laws. In several States there are now progressing thorough investigations of existing systems of taxation and thoughtful discussions of proposed methods of increasing the State revenues and, as far as possible, equalizing the burdens of taxation. Many innovations have already been introduced. The tendency seems to be for the States to decrease and in some cases to wholly abolish direct taxation for State purposes and to meet the increasing demands on the State treasuries by raising the rate and multiplying the sources of indirect taxation. The political reasons for this are good and the economical reasons are sound.

As the legislators look around for that which they may tax, their eyes soon fall upon corporations. Not only are the legislators much influenced by the popular prejudices against corporations but they themselves are biased in their own ideas. They look upon all corporations as money making organizations, which have received without recompense val-

uable franchises from the State for which they should be made to pay dearly. They seem to think that somehow the corporations have acquired inexhaustable funds from which the State may draw at will, apparently forgetting that a corporation is merely "a collective and changing body of men" to which has been given "the character and properties of individuality" and that in its individual capacity it is governed by men being by no means devoid of human frailty and weakness.

"The conditions of society and the modes of doing business in this country are such that a large part of its transactions are conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance, and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations in which individuals may safely join their small contributions without endangering their entire fortunes." To unjustly tax and increase the burdens of these organizations is to oppress investors, discourage enterprise, and thereby abridge the possibilities of uplifting humanity and curtail the opportunities for increasing the happiness

of mankind.

While recognizing the dangerous tendency of the present prejudice against corporations and of the growing tendency to increase the taxes upon corporations, we must not forget that corporate franchises are valuable concessions from the State and privileges for which they ought to give compensation. They, like private citizens, should help bear the burdens of State but in the attempt to lighten the burdens of private citizens, corporations ought not to be unjustly burdened.

When to this disposition to heavily tax all corporations we add that selfishness of men which makes them desire that others bear their burdens, we can understand why States are so desirous of subjecting foreign corporations to such heavy taxes. By this means a State may raise a large revenue from the citizens of other States and at the same time protect its own corporations from too severe competition. As we have already shown, the foreign corporation is recognized only by reason of the comity among the States and each State may impose as conditions precedent any burdens which it may desire. Paul v. Virginia 8 Wall. 168. Even after the corporation has been admitted on reasonable conditions, it is not secure for even

then the State may revoke its consent and expel the corporation or it may impose new and more burdensome conditions. People v. Fire Association of Philadelphia, 92 N. Y. 311, do. 119 U. S. 110.

We have seen that there is one condition precedent which a State cannot impose, viz., that a foreign corporation agree as the price of admission not to remove its causes from the State to the Federal courts; but although the State cannot require this agreement as a condition precedent, it may expel from its jurisdiction any foreign corporation exercising this privilege. This is somewhat incongruous but such is the holding of Doyle v. Continental Insurance Co., 94 U. S. 535.

This unjust discrimination to which foreign corporations are subjected is possible because of the holding of Bank of Augusta v. Earle (13 Pet. 586) and Paul v. Virginia, (8 Wall. 168); that a corporation is not a "citizen". The position taken seems to have resulted from a fear that, if foreign corporations were allowed to exercise their peculiar privileges within a State, the people thereof might be cheated and defrauded by these strange, elusive creatures, called corporations, which would in some

mysterious manner suddenly vanish, thereby escaping all their liabilities. Of late years the people are losing some of their prejudice against corporations and are beginning to understand more fully the rights and liabilities of corporations and to realize that, instead of being rapacious monsters in disguise, they are merely combinations of human beings. As a result of these decisions there has arisen an internecine warfare among the States so that some actuated by narrow, selfish motives try to favor their citizens and corporations at the expense of those citizens of other States who have formed themselves into corporations. Such a disposition is contrary to that broad, harmonious spirit which our forefathers tried to inculcate on this nation. It was to prevent the antagonizing of the interests of the States and of the people that the Constitution was formed, after the people had had a most bitter experience under the Articles of Confederation, during which time the hostile interests of the States had well nigh caused the disruption of the Union. Surely the framers of the Constitution would have favored no such discriminations as have been practiced since Paul v. Virginia.

Many of our best lawyers believe that "the fiction of the

legal person has outlived its usefulness and it is no longer adequate for the purpose of an accurate treatment of the legal relations arising through the prosecution of a corporate enterprise." Corporations are becoming to be regarded more as partnerships with peculiar powers and liabilities. But be this as it may, it is probably too late to look for any changes in the holding as to the citizenship of corporations. The present theory has been followed too long but it would be more in keeping with the harmony of our institutions and with the spirit of the Constitution, if corporations were regarded as citizens of their respective States and as such were allowed the same privileges and placed under the same restrictions, in each State as are [illegible] domestic corporations. To protect its private citizens each State ought to have a system of rigid examination and strict regulation applicable to foreign and domestic corporations alike. Thus would its citizens be fully protected and justice allotted to all.

Although we may expect no change in the law as to the citizenship of corporations, there is in the decisions a noticeable tendency to take a broader view as to the status of foreign corporations. Field, J., in delivering

the opinion of the court in Paul v. Virginia, said;--"It has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. In the early cases when the question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Hope Ins. Co. v. Boardman, 5 Cranch 57. In later cases this ruling was modified and it was held that the members of a corporation would be presumed to be citizens of the State in which the corporation was created and where alone it had any legal existence, without any special averment of such citizenship, the averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeat-

ing the jurisdiction of the court." Louisville Railroad Co. v. Letson, 2 How. 497; Marshall v. Baltimore and Ohio Railroad Co., 16 How. 314; Covington Drawbridge Co. v Shephard, 20 how. 227; Ohio and Mississippi Railroad v. Wheeler, 1 Black 286, 297; Steamship Co. v. Tugman 106 U. S. 118. So we see that the term "citizen" is differently interpreted in different parts of the Constitution; while it is held to include corporations so as to extend the jurisdiction of the United States Courts, it is held not to include corporations so as to protect them from unjust discrimination by the several States. We find another indication of the present liberality of the courts toward corporations in the construction put upon the term "person" as used in the Fourteenth Amendment. This is held to include corporations as well as natural persons. Santa Clara County v. Southern Pacific 118 U. S. 394; Pembina Silver Mining Co. v. Pennsylvania 125 U. S. 181; Home Insurance Co. v. New York 134 U. S. 594; C. C. & A. Railroad v. Gibbes 142 U. S. 386.

CHAPTER IV..

Corporations Engaged in Inter-state Commerce.

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We have examined the causes which effected the granting to Congress of the power to regulate inter-state commerce and we have studied those decisions of the United States Supreme Court which define the extent of this power and point out the limitations placed upon the power of the States, finding that there are two classes of inter-state commerce, concerning one of which the States may legislate until Congress acts but concerning the other of which the States may take no action even though Congress remain silent; we have also considered the status of corporations both domestic and foreign, which are engaged in business wholly within a State. Let us now investigate the right of a State to tax the business and the franchise of corporations engaged in inter-state commerce. For the purposes of our investigation let us take railroad corporations, for, while the principles involved apply to them equally with all other corporations the nature of their business is such that there is much

confusion and, if we are able to determine the relations existing between the States and railroad corporations, we shall have arrived at an understanding of the right of a State to tax the business and franchises of all corporations engaged in interstate commerce.

Without entering into a discussion of the term "franchise" we may interpret it as meaning the right of a corporation to act in its corporate capacity. The business of railroad corporations is the transmission of freight and passengers from place to place which is within the accepted definitions of the term "commerce". Since the lines of many of these corporations extend into two or more States, their business may be divided under two heads the first being the transportation of freight and passengers between two points within the same State; the second being inter-state commerce, which includes the transportation of freight and passengers from a point within the State to a point without, or from a point without the State to a point within, or from one point without the State to another point without the State by a route passing through the State.

Concerning commerce wholly within any one State Congress can take no action. It has no powers other than those conferred upon it by the

Constitution and the power to regulate commerce wholly within one State is not so conferred. This power is, therefore, retained by the States and commerce within a State is subject to such regulations as such State may decree. Therefore the business of transporting freight and passengers between points within a State's boundaries is liable to taxation just as is any other form of business.. If the States permit it to be conducted by corporations, these corporations must comply with such requirements as the States shall make. If the corporations be domestic, the States make their demands and requirements a part of the charters which the corporations must accept in order to gain a legal existence. The franchise granted are often of great value and it is eminently just that they be subjected to taxation and made to bear some of the burdens of government. The right of the State to tax these franchises is unquestionable. If the corporations be foreign they can gain admission and recognition in their legal capacity only by complying with such conditions as the States may impose.

A nice distinction is drawn in New York between the power of the States to tax the "business" and its power to tax the "franchises" of foreign corporations. The distinct-

ion arose under a statute requiring every corporation doing business in the State to "pay a tax, as a tax upon its corporate franchise or business". It is said that the franchises of foreign corporations, being dependant on the laws of the States of their creation and having no existence seperate therefrom, cannot be taxed. The franchises of a corporation exist only at its place of domicile or residence. However the business of foreign corporations may be taxed like any other business within the State. This doubtful distinction between the franchises and business of foreign corporations was drawn in People v. Equitable Trust Co., 96 N. Y. 387, 389 and approved in the recent case of People v. Wemple 33 N. E. 720. While it is true that foreign corporations first gain existence because of franchises granted by one State, is it not equally true that other States by throwing open their doors to these foreign corporations and by receiving and recognizing them in their corporate capacity thereby grant to them certain privileges in the nature of a franchise. But this distinction does not obtain everywhere. The Maine statute which was brought in question in State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217, enacted that every corporation

person, or association operating a railroad in the State should pay "an annual excise tax for the privilege of exercising its franchise" in the State Field, J., in delivering the opinion of the court said; "The privilege of exercising the franchises of a corporation within a State is one of value - - - - - - - - -. As the granting of the privilege rests entirely in the discretion of the State whether the corporation be of domestic of foreign origin, etc. etc." thus showing that the learned judge thought that a foreign corporation on being allowed to enter a State receives valuable franchise from that State and the reasoning of the case is that such franchises may be taxed.. But however this may be, whether a State nominates that which it taxes as the franchise or as the business, it is certain that a State may subject to taxation all foreign corporations conducting commerce wholly within its limits without let or hindrance.

Railroad corporations not only conduct such commerce as is wholly within a State but they also engage in inter-state commerce. It is well settled that the States cannot tax the business of conducting inter-state commerce. To tax the business itself is to regulate it and the courts have time and ~~tim~~

time again held that insiduous attempts to regulate inter-state commerce by means of taxes craftily levied on the business are contrary to the fundamental law of the land. Frequent attempts have also been made to exact license fees from those engaged in interstate commerce but the courts have held that the States may impose no conditions upon and make no exactions from those pursuing this calling. Robbins v. Shelby Taxing District, 120 U. S. 489; Lyng v. Michigan 135 U. S. 161; McCall v. California 136 U. S. 104; Norfolk & Western R. R. Co. v. Pennsylvania, 136 U. S. 114, Crutcher v. Kentucky, 141 U. S. 47. The requisition of such a license fee is in reality the imposition of a tax on the business itself, which is beyond the power of the State.

Failure to raise revenue in this way has induced a disposition to exact contribution from corporations both domestic and foreign, which are engaged in inter-state commerce on the pretext that they have received from the State and are exercising valuable franchises. Unquestionably the power to regulate inter-state commerce resides in Congress and in the exercise of its powers Congress may avail itself of whatever means it deems fit. This is by reason of

the last clause of Sect. 8, Art. 1, of the Constitution which provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." The power to create corporations is among the implied powers of Congress. This power was first exercised in creating the United States Bank and the validity of the act was established by Mc Cullough v. Maryland, 4 Wheat. 316. Pursuant to this implied power Congress may create corporations to conduct the inter-state transportation of the country and in some cases it has acted upon this authority; e. g. in incorporating the Union Pacific Railroad Company. Should Congress in the exercise of its power to regulate inter-state commerce provide that all inter-state transportation should be conducted by corporations created by itself, certainly the franchises so granted could not be taxed by the States. (Mc Culloch v. Maryland 4 Wheat. 316) Ch. J. Marshall said: "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles exempt from taxation." Franchises granted by Congress are unquestionably outside the sovereign

power of the States and therefore not subject to State taxation.

But Congress has not exercised its power in this way. By remaining silent on the subject of inter-state commerce, Congress virtually says that the natural citizens of the States are free to engage in inter-state commerce and that the corporations existing by virtue of State franchises may also participate. Those corporations already have a legal existence within the State for the purposes of commerce wholly within the State are adopted by Congress and given the privilege of embarking in inter-state commerce. Congress has not yet found it necessary, except in a few isolated cases, to create corporations for the purpose of inter-state transportation. It has been satisfied to take corporations, which are under State supervision, and confer upon them without restriction the right to embark in this business. State corporations satisfy all its requirements. Can it be said that in any way these corporations derive their right to engage in inter-state transportation from the States? Most certainly not. These franchises are ~~denied~~ derived from the general government and beirg granted by Congress the States cannot properly tax them. Corporations are

among the means and instruments adopted by Congress with which to exercise its power of regulating inter-state commerce and the States may not impair their effectiveness or curtail their usefulness by burdening them with taxes. The States may not exact license fees from those about to engage in inter-state commerce; why should they be allowed to usurp the power of Congress by limiting the legal capacity in which those engaged in inter-state commerce may act? Pensacola Tel. Co. v. West. Union 96 U. S. 1; Gloucester Ferry Co. v. Pennsylvania 122 U. S. 326; Norfolk & Western R. R. Co. v. Pennsylvania 136 U. S. 114.

Of what use would be this power of Congress were the States permitted to tax either the business of inter-state commerce itself or the instruments which Congress uses to effectuate its purposes? Chief Justice Marshall said that the power to tax involved the power to destroy. They may continue to tax an object until it is taxed out of existence. To give Congress the power to regulate inter-state commerce while leaving in the States the power to practically nullify the acts and wishes of Congress is

contrary to the fundamental theory of our Constitution. As was well said by John Marshall, that great interpreter of the Constitution there is "a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it to shreds. This great principle is, that the Constitution and laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them. From this which may almost be termed an axiom, other propositions are deduced as corolaries. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with the power to preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme."

In December 1891, the case of State of Maine v. Grand Trunk Ry. Co., reported in 142 U. S., came before the United States Supreme Court for review. The question concerned the validity of taxes levied upon the defendant corporation,

under a Maine statute requiring every corporation, person, or association operating a railroad in the State to pay to the State Treasurer "an annual excise tax for the privilege of exercising its franchises in the State." The amount of this annual excise tax was ascertained by a reference to, and ~~raised~~ varied with the average gross transportation receipts per mile within the State was ascertained by dividing the gross transportation receipts of such railroad for its whole length by the total number of miles. The court below held that the imposition of the tax was a regulation of commerce, inter-state and foreign, and therefore in conflict with the exclusive power of Congress in this respect. The Supreme Court, four of the learned justices dissenting, reversed the decision of the lower court and upheld the Maine Statute.

In case a railroad was partly within and partly without the State the average gross receipts per mile

Mr. Justice Field, delivering the opinion of the Court said:--"The tax for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the

power of the State to levy, there can be no question." Thus the court really avoided the questions concerning the right of a State to tax the franchises of railroads conducting both commerce wholly within a State and commerce between the States. No distinction was drawn between the privileges which corporations are granted by the States and the rights received from the general government, but there certainly does exist a vast difference between the powers of a State over these two classes of franchises. One infers from the language of Mr. Justice Field that the court looked upon all of the franchises exercised by the corporation within the State of Maine as having been received from that State; but such a position is not tenable. It would naturally follow from such a position that the State may determine the amount which it will exact for the privilege of exercising these franchises by a reference to the gross receipts devised from both classes of commerce. If on the other hand a State may tax only franchises which are granted by itself and if such franchises confer only the right to conduct commerce wholly within the State, it is difficult to see how the State is justified in estimating the value of the privilege thus granted by referring to

the receipts from inter-state commerce. The position of the minority of the court seems indicable, viz., that while the tax in question was called a "tax for the privilege of exercising its franchises in the State," it was in reality "a tax on the receipts of the company derived from inter-state transportation" and therefore unconstitutional.

It has been argued from the Grand Trunk Case that a foreign corporation, even though engaged in inter-state commerce, is entirely at the mercy of a State. Three propositions were deduced from the holding in that case, viz;- (1). When a corporation engaged in inter-state commerce applies for admission to a State, that State may refuse its request; but if the State does admit such foreign corporation it may tax it for exercising its franchises within the State.(2) , whether it is engaged in inter-state commerce only or (3) or it is engaged in both classes of commerce. The last proposition was established by the Grand Trunk Case but the conclusion there reached is not sustained by the line of reasoning we have followed. The authority of the case is weakened by the fact that the second proposition, which is supported by a parity of reasoning, has failed to receive the sanction of the New York Court of Appeals. The State of New York attempted to tax

the Pennsylvania Railroad Co. under a statute requiring "every corporation organized under the laws of any other State and doing business in this State" to pay an annual tax "as a tax upon its corporate franchise or business." The sole business of the corporation in the State of New York consisted of landing passengers and freight brought from other States and receiving passengers and freight for transportation to other States; that is to say it consisted entirely of inter-state commerce. The same line of reasoning which upheld the validity of the tax upon the Grand Trunk Railway Co. would have approved the tax levied upon the Pennsylvania Railroad Co. but instead of approving and following the decision of the United States Supreme Court the New York Court of Appeals distinguished State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217, and held that a State having once admitted a foreign corporation could not tax its business or franchises when engaged solely in inter-state commerce, People v. Wemple 33 N. E. 720, decided in April, 1893.

The first proposition that a State may refuse to admit a foreign corporation engaged in inter-state commerce was not material to the issue in People v. Wemple and was not there

discussed. The logical position is that a State may not exclude such a corporation. If Congress virtually adopts the corporations existing in the States and thereby authorizes them to engage in inter-state commerce, the several States may not nullify the will of Congress by excluding such corporations from their jurisdictions.

But foreign corporations having thus gained admission to a State for the purpose of inter-state commerce do not thereby acquire a right to engage in such commerce as is wholly within that State. This right can only be obtained from the State itself. But frequently the mere right to engage in inter-state commerce in the several States, which the corporations of any one of the States gain from Congress, is not sufficient to place such corporations in a position to engage in such business, as for example railroad corporations. In order to engage in inter-state commerce in the ordinary course of their business they must acquire a right of way into a State so that they may lay their tracks. The passiveness of Congress does not enable them to exercise the right of eminent domain within a State and it is probable than only in the most exceptional cases will Congress take active measures to secure this right to railroad corporations; so that, although these corporations may have a

naked right to engage in inter-state commerce within the several States of the Union, they are enabled to exercise this right only by means of State statutes permitting them to exercise the right of eminent domain and condemn rights of way. Although the States may not deny the right of railroad corporations to enter and engage in inter-state commerce, the States may, by their passiveness, prevent such corporations from acquiring the means whereby they may exercise such right.